

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
(Indianapolis Division)**

**RED BARN MOTORS, INC.,
PLATINUM MOTORS, INC., and
MATTINGLY AUTO SALES, INC.,
individually, and on behalf of other
members of the general public
similarly situated,**

V.

**COX ENTERPRISES, INC.,
COX AUTOMOTIVE, INC.,
NEXTGEAR CAPITAL, INC.,
F/K/A DEALER SERVICES
CORPORATION, successor by merger
with Manheim Automotive Financial
Services, Inc., and JOHN WICK,**

DOCKET NO. 1:14-cv-01589-TWP-DKL

CLASS ACTION

**MOTION TO CONTINUE
FINAL PRETRIAL CONFERENCE AND BENCH TRIAL SETTINGS**

NOW INTO COURT come Plaintiffs, Red Barn Motors, Inc., Platinum Motors, Inc., and Mattingly Auto Sales, Inc. (collectively, “Plaintiffs”) and respectfully request that the Court continue the Final Pretrial Conference setting, the August 28, 2017 bench trial date, and all associated final pretrial deadlines in this matter, to be reset after a ruling on class certification and the completion of class merits discovery and the class notice and opt-out periods.

1. **Class Certification Status:** After this matter was transferred to this Court, the Plaintiffs filed their Verified Amended Complaint (Dkt. 117) on March 11, 2016, adding class-wide allegations. On July 15, 2016, the Court approved the Joint Revised Case Management Plan submitted by the parties (Dkt. 144), setting certain deadlines including a deadline of October 3, 2016, for Plaintiffs to file their motion for class certification. On September 30, 2016, Plaintiffs filed their motion for class

- certification (Dkt. 153). That motion was argued before this Court on May 9, 2017, and taken under advisement (Dkt. 201).
2. **Summary Judgment Status:** On January 9, 2017, the Court granted the parties' request to set the deadline to file dispositive motions for thirty days after the ruling on the Defendants' motions to dismiss (Dkt. 177). On March 27, 2017, this Court entered an order granting in part and denying in part Defendants' Motion to Dismiss (Dkt. 186). On April 26, 2017, Defendants filed a Motion for Summary Judgment (Dkt. 192), and Plaintiffs filed a Motion for Partial Summary Judgment on their contract claim (Dkt. 194). Briefing on those motions was recently completed.
 3. **Discovery Status:** The CMP entered in this case (Dkt. 144) established a December 20, 2016, discovery deadline, and individual merits-based discovery is complete. In December 2016, the parties filed a Joint Motion to Modify Case Management Plan to establish a schedule for class merits discovery. (Dkt. 172). That motion was granted on February 28, 2017 (Dkt. 181). Pursuant to the Court's Order, any and all class merits discovery shall be served by Plaintiffs within fifteen (15) days of entry of the Court's order certifying the class, and any additional depositions shall be scheduled at the earliest practicable date. *See id.*
 4. **Trial Date and Pretrial Deadlines:** On December 30, 2016, Defendants filed an unopposed Motion to Continue Trial Setting (Dkt. 176). That motion to continue was granted by the Court on January 9, 2017, (1) setting a new dispositive motion deadline of thirty (30) days after an Order was entered on Defendants' Motion to Dismiss; (2) vacating the May 8, 2017 trial date; (3) resetting trial for August 28, 2017; (4) maintaining previously-set deadlines for expert discovery set forth in the

CMP (Dkt. 144); (5) setting a deadline of June 28, 2017 for the parties to file any objections to expert testimony; (6) setting a deadline of July 5, 2017 for parties to file and serve their final witness and exhibit lists; and (7) setting the final pre-trial conference for August 1, 2017. Dkt. 177.

5. **Trial Date Issue:** Although Plaintiffs timely and properly sought class certification several months before moving for a determination on the merits through their Motion for Partial Summary Judgment in accordance with the dispositive motion deadline established by this Court, a determination on the merits of this case prior to class certification and notice of class members could run afoul of the rule against one-way intervention. *See Costello v. BeavEx, Inc.*, 810 F.3d 1045, 1058 (7th Cir. 2016)(stating *in dicta* “[i]f an individual plaintiff were to get a favorable ruling on the merits prior to certification—and its corresponding notice and opportunity to opt out—then class members are incentivized to remain in the lawsuit to take advantage of the favorable ruling. If an individual plaintiff got an unfavorable ruling on the merits prior to class certification, class members are incentivized to opt out of the class to avoid application of the unfavorable ruling.”)(emphasis added). Accordingly, with the August 2017 trial date and associated pretrial deadlines approaching, Plaintiffs respectfully submit that it is necessary and appropriate to continue the trial date, with the trial to be reset by the Court after the ruling on class certification and the completion of class merits discovery and the class notice and opt-out period.
6. For these reasons, Plaintiffs request that the Court continue the Final Pretrial Conference setting, the August 28, 2017 bench trial date, and all associated final

pretrial deadlines in this matter, to be reset after a ruling on class certification and the completion of class merits discovery and the class notice and opt-out periods.

7. Counsel for Plaintiffs, Catherine Lasky, has consulted with counsel for Defendants, David Jurkiewicz, about this Motion. Defendants do not oppose a continuance of the Final Pretrial Conference and Bench Trial, but will be filing a separate pleading outlining their position.

WHEREFORE, for the reasons stated herein, Plaintiffs request that this Court enter the attached proposed Order continuing the Final Pretrial Conference setting, the August 28, 2017 bench trial date, and all associated final pretrial deadlines in this matter. In the alternative, Plaintiffs respectfully request that the Court hold a status conference to address the issues raised herein.

Respectfully submitted,

/s/ Catherine E. Lasky
CATHERINE E. LASKY (La. Bar No. 28652)
Pro Hac Vice
KERRY A. MURPHY (La. Bar No. 31382)
Pro Hac Vice
LASKY MURPHY LLC
715 Girod Street, Suite 250
New Orleans, Louisiana 70130
Telephone: (504) 603-1500
Facsimile: (504) 603-1503
klasky@laskymurphy.com
kmurphy@laskymurphy.com

GLADSTONE N. JONES, III (La. Bar No. 22221) *Pro Hac Vice*
LYNN E. SWANSON (La. Bar No. 22650)
Pro Hac Vice
JONES, SWANSON, HUDDALL & GARRISON, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, Louisiana 70130
Telephone: (504) 523-2500
Facsimile: (504) 523-2508
gjones@jonesswanson.com
lswanson@jonesswanson.com

CASSIE E. FELDER (La. Bar No. 27805)
Pro Hac Vice
THE CASSIE FELDER LAW FIRM
7515 Jefferson Hwy., #313
Baton Rouge, LA 70806
Main: (504) 232-1733
Cell: (504) 400-1127
cassie@cassiefelderlaw.com

JAMES M. GARNER (La. Bar No. 19589)
Pro Hac Vice
RYAN D. ADAMS (La. Bar No. 27931)
Pro Hac Vice
MATTHEW M. COMAN
(La. Bar No. 23613)
Pro Hac Vice
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, Suite 2800
New Orleans, Louisiana 70112
Telephone: (504) 299-2100
Facsimile: (504) 299-2300
jgarner@shergarner.com
radams@shergarner.com
mcoman@shergarner.com

Kathleen A. DeLaney (#18604-49)
DELANEY & DELANEY LLC
3646 North Washington Blvd.
Indianapolis, IN 46205
Telephone: (317) 920-0400
Facsimile: (317) 0404
Kathleen@delaneylaw.net

**COUNSEL FOR PLAINTIFFS AND
THE PROPOSED CLASS**

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2017, a copy of the foregoing was filed electronically. Notice of the filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

David J. Jurkiewicz
Paul D. Vink
BOSE MCKINNEY & EVANS, LLP
111 Monument Circle
Suite 2700
Indianapolis, IN 46204

Jason S. McCarter
Tracey K. Ledbetter
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309-3996

/s/ Catherine E. Lasky
Catherine E. Lasky